

APR 2004

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
O'Connell, P.J., Fitzgerald and Murray, JJ

TERM

WAYNE COUNTY,
Plaintiff/Appellee,

v

Supreme Court No. 124070
Court of Appeals No. 239438
Wayne Circuit Court No. 01-113583-CC

EDWARD HATHCOCK,
Defendant/Appellant.

WAYNE COUNTY,
Plaintiff/Appellee,

v

Supreme Court No. 124071
Court of Appeals No. 239563
Wayne Circuit Court No. 01-114120-CC

AARON T. SPECK and
DONALD E. SPECK, individuals,
Defendants/Appellants.

WAYNE COUNTY,
Plaintiff/Appellee,

v

Supreme Court No. 124072
Court of Appeals No. 240184
Wayne Circuit Court No. 01-113584-CC

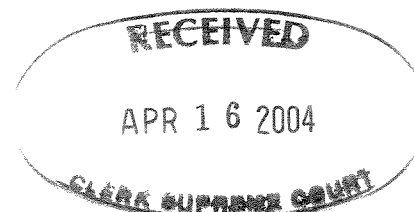
AUBINS SERVICE, INC., DAVID R. YORK,
Trustee, David R. York Revocable Living Trust,
Defendants/Appellants.

WAYNE COUNTY,
Plaintiff/Appellee,

v

Supreme Court No. 124073
Court of Appeals No. 240187
Wayne Circuit Court Nos. 01-113587-CC
01-114116-CC
01-114118-CC
01-114127-CC

JEFFREY J. KOMISAR,
Defendant/Appellant.



WAYNE COUNTY,
Plaintiff/Appellee,

v

ROBERT WARD and LELA WARD,
Defendants/Appellants,
and

HENRY Y. COOLEY,
Defendant.

Supreme Court No. 124074
Court of Appeals No. 240189
Wayne Circuit Court No. 01-114113-CC

WAYNE COUNTY,
Plaintiff/Appellee,

v

MRS. JAMES GRIZZLE and
MICHAEL A. BALDWIN,
Defendants/Appellants,

and

RAMIE FAKHOURY,
Defendant.

Supreme Court No. 124075
Court of Appeals No. 240190
Wayne Circuit Court No. 01-114115-CC

WAYNE COUNTY,
Plaintiff/Appellee,

v

STEPHANIE A. KOMISAR,
Defendant/Appellant.

Supreme Court No. 124076
Court of Appeals No. 240193
Wayne Circuit Court No. 01-114122-CC

WAYNE COUNTY,
Plaintiff/Appellee,

v

THOMAS L. GOFF, NORMA GOFF,
MARK A. BARKER, JR., and
KATHLEEN A. BARKER,
Defendants/Appellants.

Supreme Court No. 124077
Court of Appeals No. 240194
Wayne Circuit Court No. 01-114123-CC

WAYNE COUNTY,
Plaintiff/Appellee,

v

VINCENT FINAZZO,
Defendant/Appellant,

and

AUBREY L. GREGORY and
DULCINA GREGORY,
Defendants.

Supreme Court No. 124078
Court of Appeals No. 240195
Wayne Circuit Court No. 01-114124-CC

**AMICUS CURIAE BRIEF OF MICHIGAN DEPARTMENTS OF
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QUESTION PRESENTED FOR REVIEW

- I. **Whether the state may use its sovereign power of eminent domain to condemn property for the benefit of the public if the property is eventually transferred to a private entity, as articulated in *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981).**

STANDARD OF REVIEW

Amici Curiae adopt the Standard of Review as set forth in the Plaintiff-Appellee Wayne County's Brief on Appeal.

STATEMENT OF PROCEEDINGS AND FACTS

Amici Curiae adopt the Statement of Facts presented in the Plaintiff-Appellee Wayne County's Brief on Appeal.

ARGUMENT

INTRODUCTION

The Michigan Departments of Environmental Quality and Labor and Economic Growth have a significant interest in the continuing validity of the standard articulated in *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981). The use of eminent domain is essential to the continued success of brownfield redevelopment, revitalization of urban core areas, and effective land use planning. These efforts rely on the appropriate, limited use of eminent domain to assemble property for redevelopment, subject to stringent judicial review to ensure the public benefit predominates over any private interests. Narrowing the *Poletown* standard would detrimentally affect the state's ability to promote economic growth while protecting public health and the environment, and upset a system of checks and balances that adequately safeguards the rights of property owners.

Because of the Departments' interest, this brief will focus on the Court's third question in its grant of leave to appeal: "[W]hether the 'public purpose' test set forth in *Poletown, supra*, is consistent with Const 1963, art 10, § 2, and, if not, whether this test should be overruled." Amici curiae contend that *Poletown* is indeed consistent with the Michigan Constitution, and therefore this Court should not overrule that decision.

Stare decisis, while not an "inexorable command," is "generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Robinson v Detroit*, 462 Mich 439, 463, 464; 613 NW2d 307 (2000) (quoting

Hohn v United States, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998)). The Court considers four factors in determining whether to overrule precedent:

1. whether the earlier case was wrongly decided,
2. whether the decision defies "practical workability,"
3. whether reliance interests would work an undue hardship, and
4. whether changes in the law or facts no longer justify the questioned decision.

Pohutski v Allen Park, 465 Mich 675, 694; 641 NW2d 219 (2002) (citing *Robinson*, 462 Mich at 464).¹

All four factors support the continuing validity of the *Poletown* standard. The Court correctly interpreted the scope of "public use" in *Poletown* and applied it to the facts of that case. Even if this Court determines that *Poletown* was incorrectly decided, "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." *Robinson*, 462 Mich at 465. The Court "must be convinced . . . 'that less injury will result from overruling than from following [precedent].'" *Pohutski*, 465 Mich at 693-94 (quoting *McEvoy v Sault Ste Marie*, 136 Mich 172, 178; 98 NW 1006 (1904)). Subsequent decisions show that the rule of law set forth in *Poletown* is practically workable. Overruling *Poletown* would work an undue hardship on the state and municipal entities that have relied on the decision to enact legislation, create programs, and appropriate funds for economic redevelopment, brownfield redevelopment, and land use planning. Finally, there have been no changes in constitutional law or the factual assumptions of *Poletown* that would undermine the decision.

¹ While *Robinson* and *Pohutski* both concerned statutory interpretation, *Robinson* relied on *Planned Parenthood v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992), a case interpreting a constitutional provision, for its description of the factors.

For all of these reasons, the Court should take this opportunity to affirm the central holding of *Poletown*: the Constitution allows the state to condemn property for eventual transfer to a private entity if the predominant purpose is to benefit the public.

I. POLETOWN WAS CORRECTLY DECIDED.

The Court correctly decided the scope of the state's power of eminent domain in *Poletown*. Far from engaging in aberrant analysis, the Court followed a well-established principle of eminent domain law in Michigan: the state and its delegees may condemn property for transfer to private entities if the public is the primary beneficiary. When a private entity appears to benefit substantially from the transfer, the courts scrutinize the purpose of the condemnation more closely to ensure that the state is not acting as an agent for a private interest. However denominated by the Court, this inquiry into the nature of the public benefit was exactly the analysis conducted in *Poletown*.²

In interpreting a constitutional provision, the court must give effect to the intent of the ratifiers. "[T]he constitution, although drawn up by a convention, derives no vitality from its framers, but depends for its force entirely upon the popular vote." *People v Blodgett*, 13 Mich 127, 141 (1865) (Campbell, J.). To discern this intent, the court looks, in the first instance, to the "common understanding" of the provision at the time of ratification, the interpretation "'which reasonable minds, the great mass of the people themselves, would give it.'" *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971) (quoting 1 Cooley, Constitutional Limitations (6th ed), p 81). The court may also consider "the

² This Court has asked the parties to brief whether the "public purpose" test adopted in *Poletown* is constitutional. In acknowledging that "use" and "purpose" have both been invoked in prior eminent domain decisions, 410 Mich at 629-30, the Court in *Poletown* did not adopt a "public purpose" standard. Instead, the court focused on the underlying "protean concept of public benefit." *Id.* at 630.

circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished" to clarify the meaning of the provision. *Id.* at 405.

The first source of the "common understanding" is the language of the Constitution itself. *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 362; 604 NW2d 330 (2000). Article 10 § 2 of the 1963 Constitution states that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." On its face, "public use" may be commonly understood as either a right by members of the public in the property or as a service or advantage to the public. See 2A Nichols, *Eminent Domain* (3d ed), § 7.02[1] (noting that the word "is susceptible to two entirely different meanings; i.e., 'employment' and 'advantage.'") Dictionaries at the time of ratification gave both meanings. *Webster's Seventh New Collegiate Dictionary* (1963), p 978 (defining the noun "use" as "the act or practice of employing something," as well as "the privilege or benefit of using something"); *Webster's New World Dictionary of the American Language* (1961), p 817 (defining the noun "use" as both "the right or permission to use" and "the object or purpose for which something is used"). As the phrase "public use" is clearly capable of different meanings, the Court must look to the historical circumstances surrounding the ratification to determine which meaning to apply.

The Constitutional Convention debates and the Address to the People³ do not discuss the meaning of "public use," but it is clear that the historical meaning of "public use" was not changed by the 1963 Constitution. In fact, the 1963 language is a simplified version of its 1908 counterpart and was modeled in part on the U.S. Constitution. Compare Const. 1963, art 10, § 2 ("Private property shall not be taken for public use without just compensation therefor being first

³ See *People v Nutt*, ___ Mich ___; ___ NW2d ___ (2004), Slip Op at 9 (finding these sources to be "certainly relevant as aids in determining the intent of the ratifiers").

made or secured in a manner prescribed by law."), with Const 1908, art 13, § 1 ("Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law.") and US Const, Am V ("nor shall private property be taken for public use, without just compensation").

Initially, a committee to the convention proposed several changes to the four sections of the 1908 eminent domain article. 2 Official Record, Constitutional Convention 1961, p 2580. After debating these issues at length, however, the convention ultimately decided to retain almost all of the first section of the 1908 article as the entire provision on eminent domain.⁴ *Id.* at 2847. Delegate Danhof, one of the sponsors of the amendment that was adopted by the convention, explained the virtues of the 1908 language: "I submit to you that all we need is to provide that there must be just compensation paid before private property can be taken for public use. This is good constitutional language, drafted by gentlemen far more able than myself."⁵ *Id.* at 2846. At least one supporter of the amendment, Delegate Young, believed that it would allow the details of such issues as urban redevelopment to be decided by the Legislature rather than the judiciary. *Id.* at 2847 ("I think within the next few years it will be possible to get the necessary guarantees

⁴ The committee proposal included the language "public use or purpose," which the committee declared was "added to broaden the power of eminent domain and therefore resolve doubts as to the extent of public use." *Id.* at 2581. The committee declared that "[t]his change will also conform to presently established judicial interpretation." *Id.* Setting aside the quixotic nature of these two statements, the convention never debated this specific language, and there is no indication that the committee proposal was rejected because the delegates believed "public use" should be interpreted narrowly.

⁵ The fact that the convention omitted "by the public nor by any corporation" from the 1908 language should not be understood as a limitation on "public use." Delegate Danhof made clear that his inspiration came in part from the U.S. Constitution, which omits any reference to the condemning entity. *Id.* at 2846.

for the public on the question of urban renewal. It will be much easier to do it through the Legislature than by constitutional amendment.").⁶

In the Address to the People, the convention reassured Michigan voters that the simplified version would provide the same protection to property owners; there was no mention of a more stringent standard than that already in place. "This is a revision of Sec 1, Article XIII, of the present [1908] constitution which, in the judgment of the convention, is sufficient safeguard against taking of private property for public use." Address to the People, 2 Official Record, Constitutional Convention 1961, p 3403.⁷ Thus, the ratifiers would have understood the 1963 language as a continuation of the law of eminent domain in Michigan. This Court should therefore look to the state's existing jurisprudence to determine the "common meaning" of "public use."

From the very beginning of Michigan jurisprudence, the courts have recognized that "public use" included public benefits from the operation of private entities. See *Swan v Williams*, 2 Mich 427, 439 (1852) ("The power to delegate the exercise of the eminent domain, to effectuate such purpose, from the universality of its exercise, is no longer an open question."); *Ryerson v Harrison*, 35 Mich 333, 339 (1877) ("[T]he authority of the state to compel the sale of individual property for the use of enterprises in which the interest of the public is only to be subserved through conveniences supplied by private corporations or individuals has been too long recognized to be questioned."). Thus, the term "public use" has, like the due process

⁶ Delegate Bledsoe, who opposed the amendment, contended that it would insufficiently protect the property owners affected by urban renewal. *Id.* at 2847 (stating that "we ought to face this issue with this urban renewal problem" and asking the convention not "to run out on the people of Michigan whose property interests are being involved and who are looking to this convention for relief under our constitution.")

⁷ This language could also be understood as a reference to the due process limitations on takings. See *id.* at 2846 (statement by Delegate Danhof that "[t]his is a clear, concise statement of public policy with a safeguard that just compensation must first be made or secured in a manner prescribed by law.")

limitation on eminent domain, "acquired a well established meaning, which the people must be supposed to have had in view in adopting [it]."⁸ *Peterman v Dep't of Natural Resources*, 446 Mich 177, 186; 521 NW2d 499 (1994) (quoting 1 Cooley, *Constitutional Limitations* (8th ed), p 132).

That many of these early cases involved forms of transportation does not mean that the eminent domain power was limited to this type of private enterprise. At a time when encouraging communication and transportation was considered vitally important to the public welfare, condemnation provided a clear benefit to the public. *Swan*, 2 Mich at 438 ("In a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people.' 11 Peters 420, 547.") In *Swan*, the Court found that a railroad company could condemn property for its own use because the public would benefit from railroad service and movement of goods. *Id.* at 436-37. See also *Berrien Springs Water-Power Co v Berrien Circuit Judge*, 133 Mich 48, 53; 94 NW 379 (1903) (reasoning that improving navigability of a waterway for a transportation business is a public use).

The Court's varied emphases on the nature of the corporation, *Swan*, 2 Mich at 433-36, the impracticability of obtaining the particular property otherwise, *Ryerson*, 35 Mich at 339-40, and the degree of control by the public, *Board of Health of the Twp of Portage v Van Hoesen*, 87 Mich 533, 538-39; 49 NW 894 (1891), should be understood as methods to ensure that any private benefit was truly incidental, not as narrow exceptions for instrumentalities of commerce.

⁸ This meaning has remained consistent even though there have been small changes in the language of the governing provision. See Article 2 of the Ordinance of 1787 (1 Stat 51) ("public exigencies make it necessary for the common preservation"); Const 1835, art 1, § 19 ("public use"); Const 1850, art 18, § 2 ("use or benefit of the public"); Const 1908, art 13 § 1 ("public use").

Contra *Poletown*, 410 Mich at 670-81 (Ryan, J., dissenting). Such safeguards were especially important because the state had delegated its power of eminent domain to the private entities themselves. Thus, in *Ryerson*, the Court found that a mill owner could not condemn adjoining property where the owner could use the property for whatever business he chose and was not "obligated in any manner to carry [manufacture] on for the benefit of the locality or of the state at large." 35 Mich at 338. Similarly, in *Van Hoesen*, condemnation of land for a private cemetery was not a public use when the "whole effect . . . is to enable a number of private individuals to unite in purchasing property for their own use and that of their descendents." 87 Mich at 540 (quoting *In re Petition of the Deansville Cemetery Ass'n*, 66 NY 569, 573 (1876)).

In later cases, the Court continued to give effect to this meaning of "public use" by examining the primary purpose of the condemnation. In *Shizas v Detroit*, 333 Mich 44, 52; 52 NW2d 589 (1952), retail space in a municipal parking garage was not incidental to a "public use" because the purpose of reserving the space was "without reference to the public requirements." The Court found it "significant that the act does not permit merely the leasing of space not necessary to the public service, nor is it limited to space not adapted to the public use." *Id.* at 51-52. In comparison, the Court found the private benefit to an oil company from condemnation of land for a pipeline to be incidental to the primary public purpose of transportation and delivery of oil to Michigan residents. *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 39-41; 64 NW2d 903 (1954).

The Court engaged in the same analysis in cases involving slum clearance. In determining that the private *benefit* to developers from sale of the properties was incidental, the

Court looked to the primary purpose of the condemnation.⁹ *In re Slum Clearance*, 331 Mich 714, 720-22; 50 NW2d 340 (1951); see also *In re Brewster Street Housing Site*, 291 Mich 313, 335-37; 289 NW 493 (1939). In *In re Slum Clearance*, the Court acknowledged that redevelopment was part of the proposed plan for the area.¹⁰ "Reconstruction was asked for in the petition and resale is necessary for such purpose, but the resale is not for the purpose of enabling the city nor any private owner to make a profit." *Id.* at 720. Instead, the purpose of the condemnation was overwhelmingly public: "to remove slums for reasons of the health, morals, safety and welfare of the whole community." *Id.* at 722. The Court has found this purpose to be fulfilled even where the existing housing was "desirable," *In re Jeffries Homes Housing Project*, 306 Mich 638, 647; 11 NW2d 272 (1943), and the city could not immediately clear the site, *General Development Corp v Detroit*, 322 Mich 495, 499; 33 NW2d 919 (1948).¹¹

In deciding *Poletown*, the Court applied these principles to the facts at hand. The Court began with a basic rule of eminent domain law. "[C]ondemnation for a private use cannot be authorized whatever its incidental public benefit and condemnation for a public purpose cannot be forbidden whatever the incidental private gain." 410 Mich at 632. To determine whether the private gain to General Motors was incidental, the Court conducted the analysis that had become routine, by asking whether the condemnation would primarily benefit the public or the private entity. *Id.* Because General Motors clearly benefited from the condemnation, the Court

⁹ In *Poletown*, Justices Fitzgerald and Ryan explained that the condemnation was for a public use because the resale was itself incidental to the slum clearance. 410 Mich at 640-41, 673-74. The Court in *In re Slum Clearance*, however, engaged in a different analysis: whether the conceded private *benefit* to redevelopers from resale of the cleared property was incidental to the public benefit of the condemnation.

¹⁰ Simply clearing the property without redeveloping it would not have fulfilled the city's goal, nor would it have made any sense.

¹¹ Given the significant impact of slum clearance on urban areas, it is reasonable to believe that the ratifiers of the 1963 Constitution would have known about these takings and been aware that courts had upheld such condemnation for ultimate redevelopment.

scrutinized the public benefit more carefully. Only if there was "substantial proof that the public [was] to be benefited," and the public benefit was "clear and significant," not "speculative or marginal," could the condemnation be for a public use. *Id.* at 634, 635.

This heightened scrutiny standard, though articulated in different terms, was the same careful inquiry the Court had conducted in the past to ensure that the state was not promoting the welfare of the private entity over the public good. While the Court recognized that deference to the state Legislature is appropriate in determining whether an asserted public purpose is in fact public, *id.* at 632-33, it did not adopt rational basis review. Instead, the Court applied a high level of judicial review to the specific circumstances of the condemnation to ensure that the public purpose was in fact predominant when there were identifiable private interests.

There is no doubt that the facts of *Poletown* presented a very different case. Unlike the Pinnacle Aeropark Project, which was developed without reference to a specific end user, the project in *Poletown* was clearly created for and by General Motors.¹² As Justice Ryan's dissenting opinion makes clear, the close connection between General Motors and Detroit could give rise to the inference that the private benefit was more than incidental to the public use. Yet the proposed benefit to the public was substantial – more than 6,000 jobs and \$15,000,000 in tax revenues – and even Justice Ryan did not set forth any evidence that the city's motive was other than to benefit the city's residents. *Id.* at 650, 653-57. In any case, the decision in *Poletown* should not be overruled because another court may have weighed the public and private benefits differently. The decision rested on sound law, namely a "common understanding" of "public use" as interpreted by court decisions dating back to the earliest days of Michigan statehood.

¹² In fact, the lack of a specific end user makes this case an easier one than *Poletown*.

II. **POLETOWN DOES NOT DEFY PRACTICAL WORKABILITY.**

The standard in *Poletown* does not "def[y] 'practical workability.'" *Robinson*, 462 Mich at 464 (citing *Planned Parenthood v Casey*, 505 US 833, 853-56; 112 S Ct 2791; 120 L Ed 2d 674 (1992)). To be unworkable, the decision must do more than "engender[] opposition" by lower courts. *Casey*, 505 US at 855. It must be so difficult to apply as to confound the courts and lead to inconsistent decisions. Compare *id.* (finding that the "required judicial assessment of state laws . . . fall[s] within judicial competence"), with *Sington v Chrysler Corp*, 467 Mich 144, 163; 648 NW2d 624 (2002) (noting "reason for concern" because of difficulty applying the previous decision). See also *Garcia v San Antonio Metro Transit Auth*, 469 US 528, 546-47; 105 S Ct 1005; 83 L Ed 2d 1016 (1985) (rejecting the earlier rule in part because the analysis led to inconsistent results); *Swift & Co v Wickham*, 382 US 111, 116; 86 S Ct 258; 15 L Ed 2d 194 (1965) (admitting that "candor compels us to say that that we find the application of the [previous] rule as elusive as did the District Court").

No court has had difficulty understanding or applying the analysis set forth in *Poletown*. In fact, this Court recently applied the *Poletown* test to determine whether the predominant benefit of the private roads act, MCL 229.1 *et seq*, accrued to the public. *Tolksdorf v Griffith*, 464 Mich 1, 8-9; 626 NW2d 163 (2001). The Court determined that the primary intent of the act was to benefit the landlocked petitioner, based on the language of the act and the requirement that the petitioner directly compensate the adjacent landowner. *Id.* at 9. In effect, the state acted as an agent of the landlocked petitioner to "convey an interest in land from one private person to another." *Id.* See also *Lansing v Edward Rose Realty, Inc*, 442 Mich 626, 639-41; 502 NW2d 638 (1993) (applying heightened scrutiny under *Poletown* to find that the public benefit of mandatory cable access did not predominate over the private interest of the cable company).

Moreover, there is no indication that *Poletown* has produced inconsistent results. Far from creating the parade of horrors predicted by Justice Ryan in his dissent, 410 Mich at 645, the decision has been consistently applied by the courts of this state to strike down exercises of eminent domain where a private entity predominantly benefits. See *Tolksdorf*, 464 Mich at 9; *Edward Rose Realty*, 442 Mich at 641; *Novi v Robert Adell Children's Funded Trust*, 253 Mich App 330, 344; 659 NW2d 615 (2002); *Center Line v Chmelko*, 164 Mich App 251, 262-63; 416 NW2d 401 (1987).¹³ Specifically, the courts have applied heightened scrutiny to strike down condemnations where it appears the municipality is acting as an agent for a private entity, see, e.g., *Center Line*, 146 Mich App at 253 (concluding that "the city acted as an agent for a private interest" when it condemned property for a car dealership to store new cars and "the reasons given by the city for the condemnation were revealed to be a complete fiction"), as well as where it appears the public benefits are marginal, see, e.g., *Novi*, 253 Mich App at 345-46 (finding that an industrial spur road would not help eliminate traffic congestion but instead would primarily benefit the company by providing a new driveway).

While this Court has looked to criticism by lower courts in determining whether a decision defies practical workability, *Robinson*, 462 Mich at 466, the criticism of *Poletown* has not been that the standard is difficult to apply. Instead, lower courts have focused on whether *Poletown* was correctly decided. *Detroit v Lucas*, 180 Mich App 47, 54; 446 NW2d 596 (1989) (Beasley, P.J., dissenting) (expressing hope that the Court would "reexamine the basis for the *Poletown* decision"); *Detroit v Vavro*, 177 Mich App 682, 685; 442 NW2d 730 (1989)

¹³ It appears the public was the primary beneficiary of the condemnation in the only post-*Poletown* decision that approved condemnation of property for transfer to a private entity, although the court did not fully explain its reasoning. *Detroit v Vavro*, 177 Mich App 682, 687; 442 NW2d 730 (1989) (upholding, based on similarity to facts in *Poletown*, the condemnation of property for a revitalization project that would transfer property to Chrysler Corporation for an automobile assembly plant). See also *Detroit v Lucas*, 180 Mich App 47, 51-52; 446 NW2d 596 (1989) (stating in dicta that a theatre district is a public use).

(expressing hope that the Court would "take the matter up and correct the wrong done"). Indeed, there is no indication that the panel below struggled to interpret the *Poletown* standard. The panel found that the primary beneficiary would be the public, not the private companies who would eventually locate to the Pinnacle Project. *Wayne Co v Hathcock*, unpublished opinion of the Court of Appeals, decided Apr 24, 2003 (Docket No. 239438), p 8. Justices Murray and Fitzgerald requested this Court to revisit *Poletown* because in their opinion *Poletown* was incorrectly decided. *Id.* at 4 (Murray, J., concurring).

III. OVERRULING *POLETOWN* WOULD WORK AN UNDUE HARDSHIP ON LEGITIMATE RELIANCE INTERESTS.

Narrowing the *Poletown* standard would impair state economic redevelopment efforts under a series of statutes that authorize municipalities to condemn land for an approved development. In determining whether there is a sufficient reliance interest, this Court "must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 465. Restricting "public use" to rights by the public in the property would produce dislocation for the state and its municipal delegees, as well as the residents of Michigan who have benefited from the economic benefits of redevelopment.

The state's approach to redevelopment relies on the use of eminent domain where other efforts to acquire property have failed. Beginning in 1974 with the adoption of the Economic Development Corporations Act, MCL 125.1601 *et seq*, the state developed a comprehensive framework of laws to encourage economic revitalization. Downtown Development Authority Act, MCL 125.1651 *et seq*; Tax Increment Finance Authority Act, MCL 125.1801 *et seq*; Local Development Financing Act, MCL 125.2151 *et seq*; Brownfield Redevelopment Financing Act, MCL 125.2651 *et seq*. A critical element of each statute is the municipality's power to condemn

property for eventual transfer to private entities pursuant to a redevelopment plan. Communities across the state have relied on the interpretation of "public use" in *Poletown* to condemn property under these statutes. There are numerous development authorities and hundreds of millions of dollars spent on such redevelopment efforts each year.

The state and municipalities have also relied on *Poletown* to redevelop brownfield sites. Condemnation is necessary to aggregate properties around the contaminated site for eventual redevelopment. The state provides funding to municipalities, which in turn allows them to leverage private investment for remediation of the sites. In the past five years, the state awarded \$115 million in grants and loans to reclaim sites that will be used for identified economic development projects. In addition, the state gave over \$109 million in grants and \$5.6 million in loans to municipalities specifically for brownfield redevelopment, including purchase of surrounding properties for land assembly. Without the power of eminent domain, redevelopment projects that involve site remediation, such as the Oldsmobile Park Baseball Stadium and the Lansing Center, would probably not have been possible because of individual holdouts.

Revitalization of brownfields is critically important to Michigan. Earlier decades of industry and manufacturing have left many properties in Michigan environmentally degraded, contaminated with heavy metals, organic and inorganic chemicals, and petroleum constituents. Because secondary manufacturing processes associated with the auto industry in Michigan were dispersed across the state, brownfields are not limited to large cities with long histories of heavy industry and large-scale manufacturing activity. Many of these manufacturing plants are now closed and functionally obsolete. If this Court overrules *Poletown*, communities that have come to rely on the use of condemnation when necessary for redevelopment will be able to remediate fewer sites.

Reliance on *Poletown* is justified. Since 1981, when *Poletown* affirmed the constitutionality of the Economic Development Corporations Act, the state has passed two more laws that authorize condemnation for economic redevelopment. Municipalities have planned for redevelopment knowing that such condemnation is allowed, and the state has encouraged such redevelopment through grant and loan programs. Such reliance is neither based on an unexpected event, *Sington*, 467 Mich at 162 (finding no significant reliance by workers on compensation for injuries where injuries were unexpected), nor is the state unaware of the effect of the decision on its actions, *Robinson*, 462 Mich at 466 (finding that fleeing drivers who sought to evade the police did not act in reliance upon municipal liability for accidents). Moreover, as discussed above, reliance interests by property owners would not be disrupted since the common understanding of "public use" has always included benefit to the public from private entities. Cf. *Pohutski*, 465 Mich at 694-95 (considering, in the context of statutory interpretation, a citizen's reliance upon clear statutory language).

IV. THERE HAVE BEEN NO CHANGES IN LAW OR FACT THAT WOULD ERODE THE *POLETOWN* DECISION.

Poletown remains on sound footing. No related principles of Michigan constitutional law have evolved so as to leave the Court's decision "a remnant of abandoned doctrine," nor have the facts about the benefits of economic development changed so significantly as to render the "central holding obsolete." *Casey*, 505 US at 855, 860. Although Detroit faced a large-scale economic crisis at the time of *Poletown*, the Court's interpretation of the scope of "public use" did not depend on such a crisis. Moreover, the need for economic redevelopment has not vanished. Michigan continues to confront high rates of unemployment, a declining tax base in urban areas, and barriers to investment such as contaminated sites.

After *Poletown* was decided, the U.S. Supreme Court upheld a state's condemnation of property for transfer to private entities. *Hawaii Housing Auth v Midkiff*, 467 US 229; 104 S Ct 2321; 81 L Ed 2d 186 (1984) (holding that condemnation of large landowners' property for sale to lessees to correct a market failure was permissible under the Fourteenth Amendment). The Court made clear that under federal law, "public use" is coterminous with a state's police powers. "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. . . . [I]t is only the taking's purpose, not its mechanics, that must pass scrutiny." *Id.* at 243-44.

A significant number of states now recognize that "public use" includes public benefits from economic redevelopment. *Oakland v Oakland Raiders*, 32 Cal 3d 60; 646 P2d 835 (1982); *Kelo v New London*, 268 Conn 1; ___ A2d ___ (2004); *Shreveport v Chanse Gas Corp*, 794 So 2d 962 (La App, 2001), *cert den*, 805 So 2d 209 (La, 2002); *Prince George's Co v Collington Crossroads, Inc*, 275 Md 171; 339 A2d 278 (1975); *Duluth v State*, 390 NW2d 757 (Minn, 1986); *Kansas City v Hon*, 972 SW2d 407 (Mo App, 1998); *Vitucci v New York City School Construction Auth*, 289 App Div 2d 479; 735 NYS 2d 560 (2001); *Jamestown v Leever*, 552 NW2d 365 (ND, 1996).

An additional group of states allows condemnation for transfer to private entities if there is a predominant public benefit, an analysis similar to the one the Court conducted in *Poletown*. *Wilmington Parking Auth v Land with Improvements*, 521 A2d 227, 231 (Del, 1986) (examining the primary purpose of the condemnation, including the underlying purpose of the condemning authority); *Southwestern Ill Dev Auth v Nat'l City Envtl, LLC*, 199 Ill 2d 225, 240; 768 NE2d 1 (2002) (rejecting a bright-line test and instead analyzing whether members of the public are the primary beneficiaries of the taking); *Merrill v Manchester*, 127 NH 234, 237; 499 A2d 216 (1985) (evaluating the net benefits to the public of a proposed project).

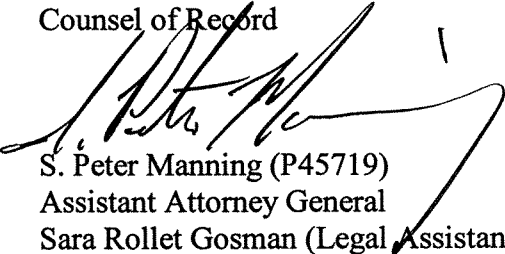
CONCLUSION AND RELIEF SOUGHT

This Court should affirm the continuing validity of the standard articulated in *Poletown* and allow the courts of the state to assess the public benefits from economic redevelopment projects such as the Pinnacle Aeropark. The decision followed the "common understanding" of the ratifiers in determining that "public use" includes public benefits from privately owned property. While federal and other state courts have expanded the definition of "public use" to include almost any taking as long as it is rationally related to a public purpose, Michigan's heightened scrutiny test substantially restricts the state's eminent domain power where there are identifiable private interests. This approach strikes an appropriate balance between the modern trend and an unduly narrow definition that would limit the eminent domain power to actual use by the public. Moreover, principles of stare decisis counsel against overruling the decision: the rule of law does not defy practical workability, the state and municipalities have relied on the decision for their redevelopment efforts, and there has been no change in the law or facts.

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